Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-643

JOSEPH B. SANCHEZ, BY AND THROUGH HIS NEXT FRIEND AND MOTHER, ELVIRA SANCHEZ,

*Petitioner,*

VS.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRADFORD PRINTING, DENVER

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IN THE

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JOSEPH B. SANCHEZ, BY AND THROUGH HIS NEXT FRIEND AND MOTHER, ELVIRA SANCHEZ,

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THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

*Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully requests this Honorable Court to issue its Writ of Certiorari directed to the judgment entered in this cause by the United States Court of Appeals for the Tenth Circuit for the following reasons:

### THE OPINION BELOW

The opinion issued by the lower court is attached hereto as Appendix A. That opinion has not, as yet, been officially reported.

### JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals to which this petition is directed was entered on July 22, 1976.

On August 4, 1976, Petitioner requested rehearing of the matter, which request was denied by the Court of Appeals by order dated August 16, 1976. (Appendix B hereto.)

Jurisdiction to review the judgment below by writ of certiorari is conferred upon this Court by the provisions of *Title 28, United States Code, Section 1254(1).*

## THE QUESTION PRESENTED

In Petitioner's view, the question presented for review by this Court may be stated as follows:

> In an action for personal injuries under the Federal Employer's Liability Act, is it proper to allow the introduction of evidence upon the possible future impact upon a plaintiff's anticipated future income which future federal and state income tax laws may have?

## STATEMENT OF THE CASE

Petitioner ("plaintiff") brought this action against the Respondent ("railroad"), pursuant to the provisions of the Federal Employer's Liability Act ("F.E.L.A."), *Tit. 45 U.S.C. §51, et seq.*, in the United States District Court for the District of Colorado, to recover damages resulting from personal injuries suffered by him while in the employ of the railroad. Federal jurisdiction was grounded upon the provisions of *Title 28, United States Code, Section 1331.*

In the jury trial before the district court, the evidence established that plaintiff, a 19 year-old, unmarried, employee, was rendered a virtual paraplegic as the result of a heavy railroad boxcar door falling upon him which he, and two co-workers, were attempting to remove from an empty boxcar.

At the time of his injuries, plaintiff was earning approximately $8,300 annually, and it was his claim that, due to the



disabilities resulting from the accident, his ability to earn a living had been substantially destroyed.

In order to attempt to demonstrate the financial impact which the destruction of this earning capacity would have upon his future, plaintiff called as a witness an expert economist. The testimony of such economist was designed to:

> 1. Establish a basis for assessing plaintiff's reasonable expectancy to future wage increases; and
>
> 2. Provide a reasonable basis for determining the method, and rate of interest, which should be utilized in reducing plaintiff's anticipated total future wage losses to "present value."[1]

This economist, then, was prepared to, and did, testify that:

> 1. Plaintiff had a "work life expectancy" of some 45 years (i.e., he could reasonably expect to work until the age 65);
>
> 2. Considering the general economic history over the 20-year period prior to the trial, as well as the railroad's specific wage history during that period, plaintiff, had he not been injured, could reasonably have expected his wage rate to have increased at the average rate of 4.9 percent per annum;
>
> 3. In light of these reasonably anticipated wage increases, plaintiff could reasonably have been expected to earn some $1,300,000 during his working lifetime;

---

[1]Such a reduction to "present value" is required in the trial of a claim under the F.E.L.A. See *Chesapeake and Ohio Ry. Co.* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L. Ed. 1117 (1916).

4. During the same historical 20-year period, the annual interest rate paid on United State's bonds, and on Moody's Triple A bonds, averaged 4.7 percent;

5. Using the foregoing figures, then, the "present worth" of plaintiff's anticipated future wage loss is $400,560.00.

As a condition precedent to the receipt of this testimony, however, the district court required this witness to be prepared to testify as to the probable impact which future income taxes would have had upon this future income stream. In doing so, this witness opined that the present worth figure should be reduced by approximately $80,000, or to approximately $320,000.00.

The trial court gave no specfic instructions to the jury with respect to the subject of income taxes, i.e., the jury was not advised whether it should, or should not, take such taxes into consideration in determining plaintiff's future wage loss, or in reducing that future loss to a present worth figure. The jury was instructed, however, that any award made to plaintiff would not be subject to such taxes.

The jury in its verdict determined that plaintiff had sustained damage in the total amount of $125,000.[2]

Plaintiff, in his appeal to the Court of Appeals for the Tenth Circuit, asserted that, considering plaintiff's wage rate at the time of his injury, it was prejudicial error to introduce the subject of income taxes before the jury, particularly when such subject was unaccompanied by an instruction informing

[2]The jury also decreed that plaintiff was contributorily negligent to the extent of 25 percent and, therefore, plaintiff's judgment in the trial court was reduced by this 25 percent figure, to $93,750. Because of evidentiary errors relating to the issue of the railroad's liability, however, the Court of Appeals directed that this judgment be increased to $125,000.00. Appendix A, pp. 4-6.



the jury as to the manner in which evidence relating thereto was to be considered by it.

The Court of Appeals, however, placing reliance for its decision upon its former opinion in *United States* v. *Sommers*, 10 Cir., 351 F2d 354 (1965), held that the district court did not abuse its discretion in requiring evidence of such matters to be introduced. (Appendix A., pp. 2-4).

## REASONS FOR GRANTING THE WRIT

In plaintiff's view, the decision of the Court of Appeals in this case, and its prior decision in the *Sommers* case, supra, placing within the exclusive discretion of the district court the question whether the impact of income taxes upon a claimed future wage loss should be considered, are inconsistent, and in conflict, with the rule established by several other circuits.

The "leading" federal decision upon the point is the Second Circuit's decision in *McWeeney* v. *New York, N.H. & H.R.R. Co.*, 282 F2d 34 (1960), *cert. den.* 364 U.S. 870, 81 S.Ct. 115. In an opinion authored by Judge Friendly in that case, it was noted that, in an action under the F.E.L.A., where the finders of fact are required, in every case, to consider such factors as the degree of loss of earning capacity, life expectancy and proper "discount rate", in order to arrive at a judgment as to the "present value" of the plaintiff's anticipated loss of future wages, adding yet another factor — the effect of future taxes upon plaintiff's future wages — would render the decision-making process too speculative. This is particularly true, it was said, where, as in both *McWeeney* and here, the plaintiff is young, unmarried, and is receiving a wage below the "middle income range".

The Court in *McWeeney*, then, did *not* place its reliance upon the *discretion* to be exercised by the trial court in dealing with such matters. Rather, it laid down the substantive

rule that the subject of income taxes was *not* to be considered, except in "exceptional" cases where the plaintiff's income was beyond the "middle range" and such taxes could be expected to have a "substantial impact" upon his net future income.

Subsequent to the *McWeeney* opinion,[3] several of the circuits have adopted its rationale. Examples of these latter decisions are the following:

*Third Circuit:*

*Domeracki* v. *Humble Oil Co.*, 3rd Cir., 443 F2d 1245 (1971)

*Fifth Circuit:*

*Johnson* v. *Penrod Drilling Co.*, 5th Cir., 510 F2d 234 (1975)

*Blue* v. *Western Railway of Alabama*, 5th Cir., 469 F2d 487 (1972)

*Boston and Maine R. R. Co.* v. *Talbert*, 5th Cir., 360 F2d 286 (1966)

*Sixth Circuit:*

*Petition of United States Steel Corp.*, 6th Cir., 436 F2d 1256 (1970)

*Seventh Circuit:*

*Cox* v. *Northwest Airlines, Inc.*, 7th Cir., 379 F2d 896 (1967)

*Ninth Circuit:*

*Burlington Northern, Inc.*, v. *Boxberger*, 9th Cir., 529 F2d 284 (1975).

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[3]The Second Circuit, in the later decision in *Cunningham* v. *Rederiet Vandeggen A/S*, 333 F2d 308 (1964), extended the substantive rule of *McWeeney* to *non-jury* cases. See, also, *Montellier* v. *United States*, 2nd Cir., 315 F2d 180 (1963); *Leroy* v. *Sabena Belgian World Airlines*, 2nd Cir., 344 F2d 266 (1965); and *Petition of Marina Mercante Necagaguense*, 2nd Cir., 364 F2d 118 (1966).



While there are, of course, nuances of differences in results amongst these decisions, nevertheless, it may be said that all of them tend to follow the "lead" of *McWeeney* in at least three ways.

First, *none* of them treat the subject as one properly to be resolved purely by means of the discretionary function of the trial judge. Rather, all of them have recognized that the matter should be one for the promulgation of a substantive rule so as to provide for a uniformity of treatment.[4]

Second, while there has been no precise mathematical formula adopted, it is fair to say, we believe, that the Circuits which have adopted the *McWeeney* approach have considered an income level below $15,000.00 per annum to be below the middle range of income. Thus, in claims involving plaintiffs with present incomes below this level, no consideration should be given to income taxes. See *Cox* v. *Northwest Airlines, Inc.*, supra, for example.

Finally, the *McWeeney* rule has been applied, even where there has been evidence presented with respect to recent inflationary trends of the economy and the effect of such continued inflation upon the plaintiff's future expectancy. *Burlington Northern, Inc.*, v. *Boxberger*, supra; *Petition of United States Steel Corp.*, supra; and *Petition of Jones*, 5th Cir., 480 F2d 1 (1973).

The evidence here reflected that plaintiff was earning only some $8,300 per annum and, even if the evidence of inflationary trends were fully credited, it would be anticipated that plaintiff would not have received, absent his injuries, an annual income in excess of $15,000 until sometime after

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[4]Particularly instructive upon this point is the Ninth Circuit's decision in *Burlington Northern, Inc.*, v. *Boxberger*, supra, where that Court recognized that, were it to adopt a rule allowing the introduction of evidence respecting income taxes in *all* cases, it would place that Court "in conflict with a number of other Circuits that have endorsed the flexible *McWeeney* approach . . . " 529 F2d at p. 294.

1984 — some ten years subsequent to the date of the trial. Under the decisions from those Circuits which have adopted the *McWeeney* rule, then, no consideration would have been given to the income tax effect upon plaintiff's pre-1984 income. See *Cox* v. *Northwest Airlines, Inc.*, supra.

The Tenth Circuit, where plaintiff's cause was tried, however, has refused to apply the *McWeeney* rule and has, in fact, failed to provide *any* substantive guidelines to the trial courts within that Circuit upon this subject. Indeed, in its decision in *Sommers*, supra, and in its decision below, it has treated the subject solely as a matter of evidence and procedure and has vested with the district courts complete discretionary authority in the premises, with the trial judge's decision thereupon being reviewable only in those instances where it is reasonably claimed that the trial court has abused its discretion.

This approach of the Tenth Circuit, we submit, places the Tenth Circuit in direct conflict with the Second, Third, Fifth Sixth, Seventh and Ninth Circuits, which have recognized that whether future income taxes should, or should not, be taken into account in determining future wage losses, is a matter involving the substantive law of damages, and that any rule relating thereto should be applied on a uniform, albeit flexible, basis.

Moreover, the substantive rule adopted by these other circuits would have decreed that the jury in this case should not have deducted from the present value of plaintiff's future income (or, at least, from that portion of the income anticipated to be received before 1984) any sum representing possible future taxes. Yet, because of the Tenth Circuit's rule, allowing the trial judge to determine for himself, in each individual case, whether taxes should be considered, it is reasonable to assume that plaintiff's jury in this case took that factor into account in determining the amount of the award.



Plaintiff's claim against the railroad arises under a federal statute and the proper amount of compensation due to him under that statute should not be dependent upon differing procedural rules of practice among the various circuits.[5]

Because the consideration given to future income taxes can have a substantial effect upon a plaintiff's rights under this federal statute; because this Court has not previously spoken to this issue; and because the decision below appears to be out of harmony with the decision of other circuits upon this matter, plaintiff submits that his petition for certiorari should be granted, so that this Court may provide for uniform treatment of F.E.L.A. claimants.

Respectfully submitted,

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November 8, 1976

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[5]To this extent, the issue of the place which future income taxes should play in determining the amount of the award under the statute is analogous to the issue of whether his future wage loss should be reduced to present value for compensation purposes. Upon this latter issue, however, this Court has promulgated a uniform, substantive rule. *Chesapeake and Ohio Ry. Co.* v. *Kelly*, supra. A similar pronouncement is, we submit, needed upon the issue here presented.

## APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOSEPH B. SANCHEZ,
*Plaintiff-Appellant,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
*Defendant-Appellee.*

No. 74-1847
(C-5026)

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

JOHN A. CRISWELL of Criswell & Patterson (Morrisard & Rossi with him on the brief) for Appellant.

CHARLES W. JOHNSON for Appellee.

Before LEWIS, Chief Judge; BREITENSTEIN and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

This is an action brought by plaintiff under the Federal Employer's Liability Act against the defendant railroad for personal injuries sustained by him during the course of his employment. The accident occurred when a 1000-pound door being removed from the interior of a railroad boxcar by Sanchez and two other employees fell on Sanchez. The case was presented to a jury and resulted in a judgment fa-



voring plaintiff in the amount of $93,750 reflecting a jury assessment of plaintiff's total damage at $125,000 reduced by a finding that plaintiff was comparatively negligent to the extent of 25 percent. Plaintiff appeals, alleging two prejudicial rulings by the trial court affecting the element of damages. Each such ruling was made early in the proceedings in anticipation of later evidentiary problems and was inflexibly adhered to during the course of the trial.

The first ruling subject to appellate complaint pertains to expert testimony regarding the present worth of Sanchez' loss of anticipated earnings during his work life. The trial court indicated that plaintiff's expert economist must either consider the impact of federal and state income taxes on net loss of earnings in his direct testimony or be prepared to consider such impact on cross-examination. Plaintiff's expert witness accordingly testified on direct examination that the present worth of plaintiff's loss of earnings was $400,000 and when reduced by probable tax impact was $320,000. This testimony was the only evidence probing this aspect of the case.

In the present posture of the case the defendant does not complain of the many assumptions made by the expert witness in arriving at his conclusions and the plaintiff cannot so complain except as to the consideration of tax impact. The many complexities noted by Judge Friendly's opinion in McWeeney v. New York, N.H. & H.R.R., 2 Cir., 282 F2 34, *cert. denied*, 364 U.S. 870, and further complicated and confounded by a multitude of subsequent cases within the circuits, although argued and presented to us in briefs, are not here pertinent. The single issue is whether the court erred in insisting that the tax impact be considered by the expert, not the broad question of the acceptability of the expert's total approach.

The trial court premised its ruling and its firmness, and properly so, on United States v. Sommers, 10 Cir., 351 F2

354, in which this court approved consideration of future tax impact in a wrongful death case stating:

> Undoubtedly situations may arise in which the failure to take into account income tax liability would produce an unconscionable result, and conversely a similar result could be obtained if too great a deduction were applied. When dealing with such an imprecise and speculative subject, the best that can be hoped for is reasonableness. It is a determination best left to the exercise of sound discretion of the trial Judge, whether with or without a jury.

*Id.* at 360. *Sommers* and the case at bar have several parallels for the facts in both cases clearly indicate a probable tax impact but are highly uncertain as to the amount of such impact. This uncertainty is compounded in the present case since plaintiff was 19, unmarried, and earning $8,300 annually with a very long statistical work life. The court's ruling was well within its discretion. Moreover, the verdict in this case seems to in no way reflect jury reliance on the expert's testimony whether considered with or without the impact of future taxes.

The second ruling of the trial court asserted to have had prejudicial and erroneous effect concerns a motion picture reenactment of the accident filmed by the defendant railroad with live persons including one person purporting to portray plaintiff and to stage his actions. During discovery proceedings the court ordered the railroad to make the motion picture available for inspection but also stated that "plaintiff shall not be allowed to use these movies as evidence on his behalf at trial." The trial judge extended the ruling of his fellow judge to the evidentiary level even though a print of the movie was furnished to plaintiff and the film was listed as a possible exhibit in defendant's pretrial statement.



Although the record is far from clear, the premise underlying the dual rulings prohibiting the plaintiff from using the subject picture as evidence appears to be a classification of the film as the work product of the defendant. We cannot give support to this premise and can give even less comfort to counsel's argumentative claim that the production was made as an aid in attempting to induce a favorable settlement for the railroad. The film bears every indicia of being prepared as a demonstrative evidentiary aid, was listed as a possible exhibit by the railroad, and, assuming a proper foundation,[1] could probably have been effectively used by one party or the other. The railroad chose not to use the film, however, and the plaintiff was prohibited from so doing by the continuing rulings of the court effectively chilling any effort by plaintiff in this area. We thus summarily reject the railroad's contention that the claim of error should not be considered because plaintiff failed to establish, in the record, an adequate foundation of accuracy.

In addition, counsel for the railroad added to the prejudicial effect of the trial court's rulings by referring to the motion picture during examination of his own witness. A defense witness testified that it was quite possible to get the door out of the boxcar. Counsel buttressed this statement by referring to the "movies of door removal" with the following question and answer:

> Q. And in fact didn't we prove it after the accident?
>
> A. Yes, sir.

---

[1]Motion pictures are, of course, admissible in evidence and are notably effective in many instances. However, such exhibits must be premised by a foundation of accuracy and fairness. Where, as here, motion pictures purport to represent a reenactment of human conduct the court should scrutinize the foundation with great care as to detail. For example, had the subject motion picture portrayed the plaintiff entering his position of peril with a look of alarm on the face of his stand-in in the film should be rejected as corrupt even though otherwise accurate.

Plaintiff's attempt to cross-examine the witness was quickly curtailed by the court. We hold, therefore, that under the total circumstances the trial court committed error in this area.

We agree, however, with the contention of the railroad that error in regard to the subject motion picture could have no greater impact than to invalidate the jury finding relating to comparative negligence and that the error will be cured by reinstating the jury's total verdict on damages in the sum of $125,000. We so hold.

The case is remanded to the district court with instructions to enter judgment in favor of plaintiff in the amount of $125,000. The judgment is otherwise affirmed.



## APPENDIX B

JULY TERM — August 16, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable Jean S. Breitenstein, Senior Judge, and The Honorable Robert H. McWilliams, Circuit Judge.

JOSEPH B. SANCHEZ,
by and through his next friend and mother,
ELVIRA SANCHEZ,
*Plaintiff-Appellant,*

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
*Defendant-Appellee.*

No. 74-1847

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

HOWARD K. PHILLLIPS
Clerk

By

LINDA A. Hall
Deputy Clerk

Supreme Court, U. S.
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*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent respectfully submits herewith its reasons for opposing the Petition for Writ of Certiorari:

### THE OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported at 538 F.2d 304.

### THE QUESTION PRESENTED

In order to put the question presented for review in clearer perspective as to the considerations for review set forth in Supreme Court Rule 19, Respondent would restate the issue as follows:

In an action for personal injuries under the Federal Employers Liability Act, does the Tenth Circuit rule which allows a trial judge discretion to determine when an "un-

conscionable result" will occur unless evidence of tax consequences on projected future income is considered, differ in any material respect from the rule in other Circuits which allows the trial judge discretion to determine the threshold beyond the "lower or middle reach of the income scale" where the proportional impact of future income taxation is substantial before evidence of tax consequences is considered?

## STATEMENT OF THE CASE

In order to more fully apprise this Court of the particular circumstances of this case which caused the trial judge to determine that evidence of tax consequences of the future income stream must be presented to the jury, Respondent offers this additional summary of the proceedings below.

Petitioner Sanchez was working as a laborer at the time of his injury. He had no special skills or training as to any other occupation. The various medical and rehabilitation experts who examined and treated the Petitioner testified that as a result of his injuries, he would be physically unable to continue as a laborer but they generally agreed that he would have a normal life expectancy and he could hold a number of sedentary type occupations without undue difficulty for the rest of his work expectancy.

At the trial, Petitioner's attorney called an economist to predict the loss of earnings which Petitioner would suffer as the result of his injury based on certain premises that (1) Petitioner would always have remained a laborer at the Railroad had he not been hurt; and (2) Petitioner would never be able to work in the future at any other occupation.

At an *in camera* hearing, it was adduced that the economist's prediction would contain an inflationary factor of 4.9% per annum. The economist indicated Petitioner would earn $68,000 in the year before he retired, and he would



average more than $28,800 per year over his work expectancy as a laborer for the Railroad.

The trial judge then informed Petitioner's attorney that he felt that such testimony would produce an unconscionable result unless the income tax consequences of the hypothetical income stream were taken into account. He pointed out to Petitioner's attorney that without the inflationary factor, the income stream of Petitioner would not approach a level where the tax consequences would be of import, and that he would not require evidence of the tax consequences except for the inflationary projections.

In his instructions to the jury, the trial judge gave no instruction limiting the jury's consideration to either gross or net future loss of earnings. No instruction was tendered or requested by Petitioner's counsel in respect to the subject of income taxation, and no objection was made to the lack of an instruction in this regard.

## REASONS FOR DENYING PETITION

If one were to put Petitioner's argument into the form of a syllogism, it would appear to be as follows:

> *Major Premise* No Circuit, except the Tenth Circuit, allows introduction of evidence of the tax consequences on a future income stream except in "exceptional cases" where the plaintiff's income exceeds the middle range.
> *Minor Premise* The future income stream in the present case is not exceptional.
>
> *Conclusion* ∴ No Circuit, except the Tenth Circuit, would allow introduction of the tax consequences in the present case.

Unfortunately for Petitioner, it is a law of logic that if either the major or minor premise upon which the conclusion is founded is false, then the conclusion is also false.

Under the facts of the case here presented, both premises are false. The major premise is false because the Tenth Circuit is in harmony with all other circuits in only allowing introduction of future tax consequences in cases where failure to do so would produce an unconscionable result. The minor premise is false because, as the trial judge found, the present factual situation as brought about by the economist's inflationary predictions of a future income stream, is exceptional.

Petitioner has attempted to disguise the problems in his deductive reasoning process by averring that the *McWeeney* rule, as originally espoused in *McWeeney v. N.Y.N. H. & H. R.R. Co.*, 282 F.2d 34 (2 Cir. 1960) cert. den. 364 U.S. 870, 81 S.Ct. 115, is a substantive rule which devests the trial judge of any discretion (although it must be applied with "flexibility"). He asserts that a review of the other cases that have followed *McWeeney* show a $15,000 per annum floor for cases in which a trial judge can require evidence of the tax impact on a future income stream.

The *McWeeney* decision itself refutes this argument. No floor was ever intended. Judge Friendly anticipated that in each case, the trial judge must make a determination, which only he could make, as to when the tax consequences on a future income stream would have an impact on the jury. In his opinion, he stated:

> "There may be cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result; but these are at the opposite end of the income spectrum from McWeeney's." (282 F.2d at 38)

> "To be sure a practice of refusing the instruction in most cases but requiring some adjustment in a few lacks precision and elegance; but we cannot disregard the practicalities of judicial administration and 'the law is untidy as life with which it deals.' Just where the line should be drawn must be left, as so much is, to the good sense of trial judges, whether acting with a jury or without."[1] (282 F.2d at 39).



Compare this language with the Tenth Circuit language in the case of *U. S. v. Sommers*, 351 F.2d 354 (10 Cir. 1965), reiterated and approved by Judge Lewis in his opinion in the present case:

> "Undoubtedly situations may arise in which the failure to take into account income tax liability would produce an unconscionable result, and conversely a similar result could be obtained if too great a deduction were applied. When dealing with such an imprecise and speculative subject, the best that can be hoped for is reasonableness. It is a determination best left to the exercise of sound discretion of the trial Judge, whether with or without a jury." (351 F.2d at 360) (cited in *Sanchez v. Denver & Rio Grande Western R. Co.*, 538 F.2d at 305.)

It is clear that Petitioner's argument is an exercise in semantics. The discretion of the trial judge in the Tenth Circuit (based on probability of an unconscionable result) is no different in application than the discretion under the *McWeeney* rule (based on decision as to whether the income stream is "exceptional").

Although, up to the present time, a dividing line near $15,000 per annum can be extrapolated from the results of the specific cases cited by Petitioner, a suggestion that all

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[1]In subsequent cases, the 2d Circuit reaffirms its position that there is no dividing line. In *Montellier v. U.S.*, 315 F.2d 180 (1963), it said at p. 186, "As we indicated in McWeeney, no precise line can be drawn." In *LeRoy v. Sabena Belgium World Airlines*, 344 F.2d 266 (1965), it said at p. 276, "We therefore conclude that McWeeney controls. That case did not lay down a flat rule, however. . . . Whether or not the district court was required to allow for the effect of income taxes in this case, we think it was at least a proper exercise of its discretion to do so."

trial judges have in the past, or must in the future, use that monetary figure as a "magic" dividing line is shallow.

Such reasoning would bring about multitudinous appellate litigation. Each aggrieved party in a future trial would attempt to show why the specific circumstances (such as a change in standards of living or inflation or tax structure) should cause a change in the $15,000 cut-off point. The decision as to when, where and why to allow evidence of the tax consequences of a future income tax stream must be left to the discretion of the trial judge.

## CONCLUSION

The Petition for Writ of Certiorari should be denied. There is no conflict among the Circuits as contended. The discretionary rule as now followed in the Circuits is working well and provides justice with proper safeguards provided by appellate review if there is an abuse of discretion.

Respectfully submitted,

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